82-762

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

CITY OF BURBANK, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this suit seeking a declaratory judgment that the federal statute encouraging state unemployment compensation coverage for state and local government employees (26 U.S.C. 3301 *et seq.*) violates the Tenth Amendment, an injunction against the assessment and collection of federal unemployment taxes, and a refund of unemployment insurance contribution paid to the State of California, is barred by the Declaratory Judgment Act (28 U.S.C. 2201-2202), the Anti-Injunction Act (26 U.S.C. 7421(a)), and the doctrine of sovereign immunity.

2. Whether respondent lacks standing to bring this suit against the United States because the asserted injury cannot be traced to any action of the federal government, but instead arises from the obligation imposed by California law to pay unemployment insurance contributions to the state government.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, the Secretary of Labor, the Secretary of the Treasury, and the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, but only if the Court grants the petition for a writ of certiorari filed by the City of Burbank in *City of Burbank* v. *United States*, No. 82-593.

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-5a),[1] is unreported. The district court's

[1] "Pet. App." refers to the appendix to the petition in *City of Burbank* v. *United States*, No. 82-593.

order of dismissal (Pet. App. 6a-7a) is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 53a) was entered on July 6, 1982. This petition is filed pursuant to Sup. Ct. R. 19.5, as a conditional cross-petition to the petition for a writ of certiorari in *City of Burbank* v. *United States*, No. 82-593, which was filed on October 1, 1982 and received by the Solicitor General on October 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 3310 and 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.), 28 U.S.C. 1331, the Tax Injunction Act (28 U.S.C. 1341), 28 U.S.C. 1346(a)(1) and the Declaratory Judgment Act (28 U.S.C. 2201-2202) are set forth in the Appendix, *infra*, 1a-4a. The pertinent portions of the Federal Unemployment Tax Act (1939) (26 U.S.C. (& Supp. IV) 3301-3311), are set forth at Pet. App. 55a-60a.

STATEMENT

Respondent brought this suit in the United States District Court for the Central District of California, seeking a declaratory judgment that the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667, which extend unemployment compensation under state law to state and local government employees, are unconstitutional under the Tenth Amendment. These amendments provide for denial of tax credits against the federal unemployment tax for private employers within a state if that state government fails to extend unemployment compensation to its employees. Respondent also sought an

injunction restraining the termination of tax credits for private employers and termination of federal grants that otherwise would result in states which fail to comply with these federal statutory amendments (Pet. App. 82a-84a). Finally, respondent sought a refund from the federal government of unemployment insurance contributions in the total amount of $123,599.84 that it had paid under state law to the State of California (Pet. App. 78a-82a).

Under the pertinent provisions of the Federal Unemployment Tax Act (1939) (FUTA) (26 U.S.C. (& Supp. IV) 3301 *et seq.*), Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds conforms to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31. The certification of the Secretary of Labor is the prerequisite for tax credits for private employers subject to the state law and for federal grants of money.

Section 3301 currently imposes a tax on most private employers equal to 3.4% of the first $6,000 of wages paid to each employee.[2] In turn, Section 3301 permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is cer-

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[2] See 26 U.S.C. 3301(1) and 3306(b)(1).

[3] 26 U.S.C. 3302(a)(1).

[4] See 26 U.S.C. 3302(a)(1), (c), and (d)(1).

tified as provided in section 3304 * * *" (26 U.S.C. 3302(a)(1)).

If the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year. An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second grant is for the administration of public employment offices, which provide job-finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2670-2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Pet. App. 56a-60a) to require, as a condition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same terms and conditions as private employees. These amendments (the "1976 Amendments") apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

The district court dismissed respondent's complaint (Pet. App. 6a-7a) with prejudice on the ground that it was barred by res judicata as a result of respondent's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980).

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[5] See Sections 301-303 of the Social Security Act, 42 U.S.C. 501-503.

[6] See Sections 1-12 of the Act of June 6, 1933, ch. 49, 48 Stat. 113-117, 29 U.S.C. 49-49k.

The court of appeals affirmed (Pet. App. 1a-5a). It agreed with the district court that respondent's claim for declaratory and injunctive relief was identical to the claim adjudicated in *County of Los Angeles*, so that respondent's claim was barred by res judicata. The court of appeals further held that respondent's claim for a refund was barred by collateral estoppel. As the court concluded, respondent's claim for a refund turns on the same constitutional issues that the court in *County of Los Angeles* was required to resolve and did resolve in deciding the claim for equitable relief (Pet. App. 3a-5a). Neither of the courts below addressed the respondent's constitutional arguments or the federal government's jurisdictional and standing defenses.

REASONS FOR GRANTING THE PETITION

Respondent has filed a petition for a writ of certiorari in No. 82-593, seeking review of the decision of the court of appeals affirming the dismissal of respondent's suit on the grounds of res judicata and collateral estoppel. Although neither of the courts below reached respondent's argument that the 1976 Amendments to the Federal Unemployment Tax Act violate the Tenth Amendment, respondent's petition for certiorari in No. 82-593 seeks review of those issues as well. We intend to oppose respondent's petition. If that petition is granted, however, the Court should also grant this cross-petition in order to preserve the government's right to support the dismissal of respondent's suit on the basis of the jurisdictional and standing grounds not addressed by the courts below.[7]

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[7] Although it would appear that a cross-petition may not be necessary in order to raise an argument that does not seek to alter the judgment of the court of appeals, we are neverthe-

1. The district court lacks subject matter jurisdiction over this suit. The requested injunctive and declaratory relief is barred by statute, and the claim for a refund of unemployment insurance contributions is not a claim as to which the federal government has consented to be sued.

a. The Anti-Injunction Act, 26 U.S.C. 7421(a), bars respondent's claim for injunctive relief. That Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The Anti-Injunction Act bars this suit because respondent seeks to restrain the government from denying FUTA tax credits to private employers for their contributions to a state unemployment fund even if the state fails to provide unemployment compensation coverage for state and local government employees. This suit is therefore an action to restrain the assessment and collection of a federal tax. See *County of Los Angeles* v. *Marshall*, 442 F. Supp. 1186 (D.D.C. 1977), aff'd on other grounds, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980). Fur-

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less filing this conditional cross-petition out of an abundance of caution to preserve our arguments with respect to jurisdiction and standing. E.g., *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); see *Langnes* v. *Green*, 282 U.S. 531 (1931). Cf. *Strunk* v. *United States*, 412 U.S. 434 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 & n.4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, a cross-petition would not appear to be necessary where the objection to be raised is that the lower courts had no jurisdiction to consider the case. See *Peoria & P.U. Ry.* v. *United States*, 263 U.S. 528, 535-536 (1924); *Mattingly* v. *Northwestern Virginia R.R.*, 158 U.S. 53, 57 (1895). See also *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359 (1932); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 125 (1804).

ther, the decisions of this Court establish beyond question that the constitutional nature of respondent's claim does not circumvent the bar of the Anti-Injunction Act. See *Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752, 759-760 (1974); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 11 (1974).

As this Court has held, the sole and exceedingly narrow exception to the Anti-Injunction Act is that an injunction may issue only when (a) "under the most liberal view of the law and the facts, the United States cannot establish its claim," and (b) equity jurisdiction otherwise exists because irreparable injury will occur in the absence of an injunction. *Enoches* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962); *Bob Jones University* v. *Simon*, 416 U.S. 725, 742-746 (1974).

Respondent's suit fails both tests. This Court has ruled that federal grants and tax credits of the same character as those here are not coercive and do not intrude upon state sovereignty. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-593 (1937); *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525-526 (1937). Two courts of appeals, moreover, have rejected respondent's argument that the 1976 Amendments are unconstitutional. *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980); *State of New Hampshire* v. *Marshall*, 616 F.2d 240 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980). It therefore cannot be suggested that "under the most liberal view of the law," the government cannot prevail on the merits of its claim. Nor have respondents alleged the requisite irreparable injury—viz., injury without adequate legal remedy. To the contrary, a suit for refund

affords private employers a full opportunity to litigate the constitutionality of the tax. *Commissioner* v. *"Americans United" Inc.*, *supra*, 416 U.S. at 761-762. See, e.g., *Steward Machine Co.*, *supra*, 301 U.S. at 548.

Moreover, the states have an adequate remedy at law insofar as they are able to seek review of the Secretary of Labor's adverse determination. See, e.g., *State of New Hampshire* v. *Marshall*, *supra*; *State of Alabama* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Congress has provided for judicial review of the Secretary's decision declining to certify the laws of a state as conforming to the 1976 Amendments to the Federal Unemployment Tax Act. Section 3310 of the 1954 Code (Appendix, *infra*, 1a) provides for review by the courts of appeals and by this Court of any such determination by the Secretary to withhold a state's certification. Furthermore, Section 3310(d) explicitly states that the Secretary may not withhold certification until after exhaustion of the time to petition for review, and that the courts "may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights."

Congress has therefore established a method for judicial review of questions of state certification, and these provisions adequately protect the interests of the state. Indeed, in *State of New Hampshire* v. *Marshall*, *supra*, a state advanced the identical constitutional challenge as respondent, and the Secretary's 1978 decertification decision was stayed pending review by the court of appeals. Given these well-established and effective review procedures, it is plain that respondent

has an adequate remedy at law. This suit is therefore barred by the Anti-Injunction Act.

b. Respondent's suit for declaratory relief is likewise barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201-2202 (Appendix, *infra*, 4a). With one exception not pertinent here, that Act bars declaratory suits "with respect to Federal taxes." But respondent seeks a declaratory judgment respecting the federal unemployment tax liability of private employers who are not even parties. As this Court has observed, the bar of the tax exception to the Declaratory Judgment Act against such suits is at least as broad as the Anti-Injunction Act. See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 732-733 n.7; *State of California* v. *Regan*, 641 F.2d 721, 723 (9th Cir. 1981).

c. Finally, this suit is barred by the doctrine of sovereign immunity. The United States has not consented to be sued for a refund of unemployment insurance contributions paid to a state. It is well established that the United States, as sovereign, may not be sued without its consent and that the terms of its consent define the Court's jurisdiction. E.g., *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500-502 (1940). When an officer of the sovereign issued, the general rule is that the suit is against the sovereign if " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson* v. *Domestic & Foreign Corp.*, * * * [337 U.S. 682], at 704 [1949]." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). See also *Hawaii* v. *Gordon*, 373 U.S. 57,

58 (1963); *Louisiana* v. *McAdoo*, 234 U.S. 627, 633 (1914). The exceptions to this rule are "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Malone* v. *Bowdoin*, * * * [369 U.S. 643], at 647 [1962]." *Dugan* v. *Rank*, *supra*, 372 U.S. at 621-622. These exceptions are inapplicable where, as here, the requested order would require affirmative action by the sovereign or affect the disposition of sovereign property. *Hawaii* v. *Gordon*, *supra*, 373 U.S. at 58; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

Even on the assumption that respondent's claim for a refund from the federal government of taxes paid to the State of California is otherwise a claim upon which relief can be granted, the government has not consented to be sued in this manner. Although 28 U.S.C. 1346(a)(1) (App., *infra*, 3a), upon which respondent relies (Pet. App. 48a), confers jurisdiction on district courts over civil actions to recover taxes or sums erroneously or illegally collected under the internal revenue laws, the unemployment insurance contributions that respondent paid to the State of California are not taxes or sums collected under the internal revenue laws. Rather, they are taxes paid to California as required by California law. Cal. Unemp. Ins. Code § 634.5 (West. Supp. 1982). Cf. *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 2; *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 775 n.3 (1981).[8] While it is true that Cali-

[8] Respondent also erroneously relies (Pet. App. 78a) upon 28 U.S.C. 1331(a) (App., *infra*, 3a), which confers sub-

fornia in turn deposits such contributions in the Treasury of the United States, the contributions are held in trust for the State and will be returned to the State. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 596 (1937); *Gillum* v. *Johnson*, 7 Cal. 2d 744, 762, 62 P. 2d 1037, 1045 (Sup. Ct. 1936). See Social Security Act, 42 U.S.C. 1104.

2. Furthermore, respondent lacks standing to bring this suit. As the Court held in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976), the "case or controversy" requirement of Article III of the Constitution requires that a federal court—

> act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

There is no such injury in this case. The 1976 Amendments do not compel respondent to make unemployment insurance contributions to the State of California. Rather, the statutes of California require that respondent make those payments. Cal. Unemp. Ins. Code, *supra*, § 634.5. Furthermore, even if a district court were to declare the 1976 Amendments unconstitutional, it still would be highly speculative whether

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ject matter jurisdiction on the district courts over civil actions where the matter arises under the Constitution, laws or treaties of the United States. That statute does not constitute consent by the United States to be sued. See, e.g., *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978); *American Science & Engineering, Inc.* v. *Califano*, 571 F.2d 53, 63 (1st Cir. 1978); *Commonwealth of Kentucky ex rel. Hancock* v. *Ruckelshaus*, 362 F. Supp. 360, 367-368 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974), aff'd *sub nom. Hancock* v. *Train*, 426 U.S. 167 (1976). But cf. *Ryan* v. *Federal Deposit Insurance Corp.*, 565 F.2d 762 (D.C. Cir. 1977).

the State of California would cease to require unemployment insurance contributions from respondent. And "unadorned speculation will not suffice to invoke the federal judicial power." *Simon* v. *Eastern Kentucky, supra*, 426 U.S. at 44. No matter what federal law provides, the final decision whether respondent must pay for unemployment insurance coverage for its employees rests with the State of California. "A State, of course, is free to expand its coverage beyond the federal minimum without jeopardizing its federal certification." *St. Martin Evangelical Lutheran Church* v. *South Dakota, supra*, 451 U.S. at 775, n.3. Cf. *Plumas County Board of Supervisors* v. *Califano*, 594 F.2d 756, 759-760 (9th Cir.), cert. denied, 444 U.S. 864 (1979).[9]

Nothing in this record shows, moreover, that the State of California either perceives or asserts any Tenth Amendment violation. Accordingly, the constitutional aspects of standing aside, as a prudential matter respondent is not the proper proponent of California's interest in preserving its sovereignty, especially since the object of respondent's suit is to avoid paying to California the amounts due to it under the law of that State. In sum, respondent has not been injured by the 1976 Amendments, and, even if the 1976 Amendments were held to be unconstitutional, respondent's obligation under state law to pro-

[9] Respondent's lack of standing is not cured by the provision of state law that automatically repeals the obligation of political subdivisions to provide coverage for their employees in the event that the Court declares the 1976 Amendments unconstitutional. See 1978 Cal. Stat. ch. 2, § 104 (West Supp. 1982) (Pet. App. 73a-75a.) A judgment of a district court would not trigger such a repeal, and, at all events, California could reinstate coverage of state and local government employees at any time.

vide unemployment insurance coverage for its employees might well continue unabated.[10]

CONCLUSION

The petition for a writ of certiorari should be granted, but only if the Court grants the petition in No. 82-593.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[10] Alternatively, even on the assumption that the obligation to pay unemployment insurance contributions to the State of California is an injury that confers standing upon respondent, it is plain that the suit must be brought in a state court. The Tax Injunction Act, 28 U.S.C. 1341, App., *infra*, 3a, provides that the district courts "shall not enjoin, suspend or restrain the * * * collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Last Term in *California* v. *Grace Brethren Church*, *supra*, the Court held that the Tax Injunction Act barred the district courts from entertaining a suit for declaratory and injunctive relief brought on First Amendment grounds by religious schools that sought relief from the obligation to pay unemployment insurance contributions to the State of California. Accordingly, even if respondent has standing so that a successful suit would terminate its obligation to pay contributions to the State, that suit can be brought only in a state court. See *Grace Brethren Church*, *supra*, slip op. 23, n.38.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3310. JUDICIAL REVIEW.

(a) *In general.*—Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United State court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary of Labor. The Secretary of Labor thereupon shall file in the court the record of the proceedings on which he based his action as provided in section 2112 of title 28 of the United States Code.

(b) *Findings of Fact.*—The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary of Labor to take further evidence, and the Secretary of Labor may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) *Jurisdiction of court; review.*—The court shall have jurisdiction to affirm the action of the

Secretary of Labor or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(d) *Stay of Secretary of Labor's Action.*—

(1) The Secretary of Labor shall not withhold any certification under section 3303(b) or section 3304(c) until the expiration of 60 days after the Governor of the State has been notified of the action referred to in subsection (a) or until the State has filed a petition for review of such action, whichever is earlier.

(2) The commencement of judicial proceedings under this section shall stay the Secretary of Labor's action for a period of 30 days, and the court may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights.

(e) *Preference.* — Any judicial proceedings under this section shall be entitled to, and, upon request of the Secretary of Labor or the State, shall receive a preference and shall be heard and determined as expeditiously as possible.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.* — Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any

person, whether or not such person is the person against whom such tax was assessed.

28 U.S.C.:

SEC. 1331. *Federal question; amount in controversy; costs*

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

SEC. 1341. *Taxes by States*

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

SEC. 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

SEC. 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SEC. 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 391541 1157

Office - Supreme Court, U.S.
FILED
DEC 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-762

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA, *et al.*,
Cross-Petitioners,

v.

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,
Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF BURBANK IN RESPONSE

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF BURBANK IN RESPONSE

Cross-Respondent City of Burbank ("Burbank"), through counsel, submits this response to the Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Cross-Petition") in the above-captioned action.

SUMMARY

Cross-Respondent does not object to consideration by the Court of the issues raised by cross-petitioners in their Cross-Petition if the Court also grants cross-respondent's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Petition").[1] With one

[1]City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (No. 82-593).

notable exception, however, cross-respondent disagrees with the position cross-petitioners have taken in their Cross-Petition. That exception is cross-petitioners' concession that the amounts Burbank has paid, and continues to pay, to cross-petitioner Secretary of the Treasury are a federal tax.

The thrust of cross-petitioners' argument is that the district court lacks subject matter jurisdiction over Burbank's suit because the relief Burbank seeks is barred by the Anti-Injunction Act,[2] the federal tax exception to the Declaratory Judgment Act[3] and the doctrine of sovereign immunity.[4] The Anti-Injunction Act is inapplicable first because Burbank is seeking a refund of federal taxes paid and not an injunction prior to the payment of taxes, second because Burbank is not a "person" within the statutorily prescribed definition of that term and third because Burbank has no other adequate remedy at law. The federal tax exception to the Declaratory Judgment Act is inapplicable because it is only as broad as the Anti-Injunction Act. The doctrine of sovereign immunity does not apply because, through 28 U.S.C. § 1346(a)(1) (1976), cross-petitioners have consented to suit.

Cross-Petitioners also contend that Burbank lacks standing because the injury it alleges cannot be traced to any action on the part of cross-petitioners.[5] Nothing could be further from the truth. The California statute[6] which extends unemployment compensation coverage to Burbank's employees on the terms set forth in the Federal Unemploy-

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[2]26 U.S.C. § 7421 (1976 & Supp. V 1981).

[3]28 U.S.C. §§ 2201-2202 (1976).

[4]Cross-Petition at 6-11.

[5]*Id.* at 11-13.

[6]1978 Cal. Stat. Ch. 2.

ment Tax Act ("FUTA")[7], and which has necessitated Burbank's payments to the Secretary of the Treasury, expressly provides that it was enacted solely because of the Unemployment Compensation Amendments of 1976 ("1976 Amendments" or "Amendments"),[8] which amended the FUTA to require the States to extend unemployment compensation coverage to state and local employees. That statute also provides that, if this Court holds the 1976 Amendments to be unconstitutional, the provisions of the statute requiring coverage of state and local employees become inoperative. As such, the harm cross-respondent alleges is traceable directly to the actions of petitioners.

RESPONSE

I. The District Court Has Subject Matter Jurisdiction Over This Action.

A. Even Though the 1976 Amendments Impose a Federal Tax on State and Local Governments, the Anti-Injunction and Declaratory Judgment Acts Do Not Deprive the District Court of Subject Matter Jurisdiction.

Implicit in cross-petitioners' argument that the Anti-Injunction and Declaratory Judgment Acts bar this suit is cross-petitioners' recognition that the moneys which state and local governments now must pay the Secretary of the Treasury, pursuant to subsections 3304(a)(3),(6)(A) of the

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[7]26 U.S.C. §§ 3301-3311 (1976 & Supp. V 1981), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

[8]Pub. L. No. 94-566, 90 Stat. 2667.

FUTA, are a federal tax.[9] In order to obscure this concession, presumably due to cross-petitioners' awareness of cross-respondent's immunity from such federal taxation, and in order to attempt to bring this action within the confines of the Anti-Injunction and Declaratory Judgment Acts, cross-petitioners claim that cross-respondent "seeks to restrain the [federal] government from denying FUTA tax credits to private employers for their contributions to a state unemployment fund. . . ."[10] This, of course, is not the relief cross-respondent seeks. As a simple reading of the Complaint for Refund of Federal Taxes Illegally Collected ("Complaint")[11] plainly reveals, the relief cross-respondent seeks is: 1) a refund of the amount of federal taxes cross-respondent has paid for unemployment compensation coverage of its employees; 2) a declaratory judgment that the 1976 Amendments, to the extent that they require cross-respondent to provide unemployment compensation coverage to its employees, are unconstitutional; and 3) an injunction against enforcement of those provisions of the 1976 Amendments held unconstitutional.[12] Properly characterized, therefore, the Anti-Injunction and Declaratory Judgment Acts do not bar the relief cross-respondent seeks.

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[9]The tax exception to the Declaratory Judgment Act specifically provides that it is inapplicable "with respect to Federal taxes." 28 U.S.C. § 2201. With respect to the Anti-Injunction Act, this Court has held that it applies to "suits seeking injunctions prohibiting the collection of *federal taxes.*" Enoch v. Williams Packing & Navigation Co., 370 U.S. 1, 5 (1962) (emphasis added); *compare* 28 U.S.C. § 1341 (1976) (prohibiting district courts from enjoining the assessment or collection of state taxes).

[10]Cross-Petition at 6.

[11]City of Burbank v. United States of America, No. 80-00205 MML (GX) (C.D. Cal. June 20, 1980).

[12]Compl. *ad damnum* clause (Petition at 83a).

With respect to the Anti-Injunction Act, in *Enoch v. Williams Packing & Navigation Co.*,[13] the Court held that "[t]he manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund."[14] This is precisely the course cross-respondent has followed. Cross-Respondent has paid, and continues to pay, the amounts necessitated by the 1976 Amendments, and now has brought suit for a refund of these illegally assessed and collected amounts. As such, cross-respondent's actions are fully consistent with the declared goals of the Anti-Injunction Act.

Even if the Court were to determine that cross-respondent's suit is a suit for injunction rather than a suit for refund, the Anti-Injunction Act still would not apply. That Act only prohibits "persons" from seeking to restrain the assessment or collection of federal taxes. For purposes of Title 26, 26 U.S.C. § 7701 defines a "person" as "an individual, a trust, estate, partnership, association, company or corporation." This definition does not include states, cities or other political subdivisions, and, accord-

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[13]370 U.S. 1 (1962).

[14]*Id.* at 7. Cross-Respondent's request for injunctive relief was made to avoid the necessity of repeated refund suits if the 1976 Amendments are held unconstitutional. In Bob Jones Univ. v. Simon, 416 U.S. 725 (1974), the Court recognized that "it may be possible to conclude that a suit for a refund is not 'for the purpose of restraining the assessment or collection of any tax . . .,' and thus that neither the literal terms nor the principal purpose of § 7421(a) is applicable." 416 U.S. at 748 n. 22. To the extent that the Court has left this issue undecided, the instant suit provides the appropriate circumstances for resolution of this issue.

ingly, the Anti-Injunction Act remains unavailable as a bar to the instant action.[15]

Finally, even assuming that this is not a refund suit and that Burbank is a "person" within the meaning of that term, the Anti-Injunction Act still does not bar maintenance of this suit because cross-respondent's circumstances are such that it has no other adequate remedy at law. In *Williams Packing,* the Court held that the Act would not apply if a party would have no other adequate legal remedy.[16] Cross-Petitioner suggests that section 3310 of the FUTA, which allows a state to seek judicial review of a determination by the Secretary of Labor to decertify a state's unemployment compensation law found by the Secretary to be not in conformity with section 3304(a) of the FUTA, is an adequate legal remedy.[17] However, as the language of section 3310 specifically provides, that section is available only to a state. Therefore, a political subdivision, such as Burbank, may not avail itself of section 3310, and, as discussed more fully at 9-12 *infra,*

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[15]There are sound policy reasons, in the context of the Anti-Injunction Act, for excluding from the definition of "person" states and political subdivisions. As discussed in the Petition, at 20-25, the doctrine of intergovernmental tax immunity prohibits the federal government from imposing on the States and their political subdivisions a federal tax which would impair their ability to perform traditional governmental functions. The States and their political subdivisions should not be forced to seek relief by way of a refund suit, and thereby endure for the length of the suit, the potentially crippling consequences to their functions from an ongoing drain on their budgets due to the imposition of a federal tax. Rather, the States and their political subdivisions should be allowed to seek immediate relief from the federal government's interference.

[16]370 U.S. at 7; *see also* Bob Jones Univ. v. Simon, 416 U.S. 725, 737 (1974).

[17]Cross-Petition at 8-9.

California, while vigorously objecting to the 1976 Amendments and indicating its support for challenges to the Amendments, has determined not to take the steps necessary for section 3310 review. Accordingly, cross-respondent has no adequate remedy at law,[18] and the Anti-Injunction Act does not apply.

Just as the Anti-Injunction Act is inapplicable, so too is the federal tax exception to the Declaratory Judgment Act. This Court has held that the federal tax exception is as broad as the Anti-Injunction Act, but has declined to hold it to be broader.[19] Accordingly, the limits on the applicability of the Anti-Injunction Act should attach to the federal tax exception to the Declaratory Judgment Act, and thereby allow the declaratory relief cross-respondent seeks.[20]

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[18]Cross-Petitioners' suggestion that private employers, through a refund suit, adequately could protect the constitutional rights of cross-respondent, Cross-Petition at 7-8, is absurd. Certainly the federal government would not entrust to a private litigant the interests of the United States.

[19]Bob Jones Univ. v. Simon, 416 U.S. 725, 732 n. 7 (1974).

[20]It is noteworthy that, even in the case which cross-petitioners claim provides the basis for application of res judicata and collateral estoppel, County of Los Angeles v. Marshall, 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980) (Petition at 8a), Brief for the United States in Opposition at 4-6, City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (No. 82-503), the court rejected the federal government's argument that the Anti-Injunction and Declaratory Judgment Acts bar suits such as the instant suit. By failing to address the merits of either appellants' or appellees' position, and, instead, simply adopting the reasoning of the First Circuit in New Hampshire Dept. of Employment Sec. v. Marshall, 616 F.2d 240 (1st Cir.), *appeal dismissed* and *cert. denied,* 449 U.S. 572 (1980) (Petition at 31a), the District of Columbia Circuit implicitly rejected the contention that plaintiffs' suit was barred by the Anti-Injunction and Declaratory Judgment Acts because *New Hamp-*

B. Cross-Petitioners Have Consented To Be Sued.

Cross-Petitioners do not dispute that they are not immune from suit, under 28 U.S.C. § 1346(a)(1) (1976), for the recovery of illegally assessed or collected internal-revenue taxes.[21] Instead, they now claim, in direct contravention of the premise underlying their arguments based on the Anti-Injunction and Declaratory Judgment Acts, that the payments Burbank makes to the Secretary of the Treasury are a state tax.[22] These payments, however, cannot be both a federal tax and a state tax, and cross-petitioners must not be allowed to characterize them as such in order to deprive cross-respondent of all avenues of judicial review of the constitutional violations occasioned by the 1976 Amendments.

Further, in view of the procedural posture of the case, cross-petitioners' now convenient assertion as fact, that Burbank's payments to the Secretary of the Treasury are a state tax, cannot be accepted. This Court repeatedly has held that, for purposes of a motion to dismiss, the well-pleaded allegations of a complaint are treated as true.[23] Cross-Respondent's Complaint alleges that its payments are a federal tax.[24] Accordingly, its allegations, and not cross-petitioners' unsupported representations, are controlling. Any other result would allow cross-petitioners to

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shire was a challenge, under section 3310 of the FUTA, to the Secretary of Labor's decertification of New Hampshire's unemployment compensation law. Accordingly, the Anti-Injunction and Declaratory Judgment Acts were not an issue.

[21] Cross-Petition at 10.

[22] *Id.*

[23] *E.g.*, Miree v. DeKalb County, Ga., 433 U.S. 25, 27 n. 2 (1977); Gardner v. Toilet Goods Ass'n., 387 U.S. 167, 172 (1967).

[24] Compl. ¶¶ 9, 10(a) (Petition at 80a-81a).

defeat the court's jurisdiction, and thereby avoid resolution of one of the primary issues raised in the Complaint, by the simple expedient of rewriting cross-respondent's Complaint.

II. Burbank Has Standing To Sue Because the Injury Alleged Is Traceable to the Actions of Cross-Petitioners.

Finally, cross-petitioners argue that cross-respondent lacks standing to challenge the 1976 Amendments because California law, rather than the 1976 Amendments, requires cross-respondent to make payments for the unemployment compensation coverage of its employees, and that if the 1976 Amendments are held unconstitutional, "it still would be highly speculative whether the State of California would cease to require unemployment insurance contributions from [cross-] respondent."[25] This

[25]Cross-Petition at 11-12. The federal government has made virtually the same argument concerning standing in other cases challenging provisions of the FUTA. For example, in Cabais v. Egger, 527 F.Supp. 498 (D.D.C. 1981), *aff'd in part, rev'd in part* and *remanded*, 690 F.2d 234 (D.C. Cir. 1982); Rivera v. Patino, 524 F.Supp. 136 (N.D. Cal. 1981), *appeal pending*, No. 81-4473 (9th Cir. filed Sept. 8, 1981), private party plaintiffs challenged the pension/retirement pay offset provision of the FUTA, 26 U.S.C. § 3304(a)(15) (1976 & Supp. V 1981), and its respective state counterparts, and the federal government argued that plaintiffs lacked standing to sue the federal government because the amounts offset were offset only as a result of state law, *see Cabais*, 527 F.Supp. at 501-02; *Rivera*, 524 F.Supp. at 141-43. In *Rivera*, even California, which generally agreed with the federal government's position on the merits, joined in rejection of the federal government's position on standing: "the federal government would like to tiptoe out of this case so that irrespective of this court's holding, the federal government could continue to enforce its program elsewhere," Points and Authorities in Opposition to Motion for Preliminary Injunction and in Support of Motion To Dismiss at 2.

The district courts, while reaching different conclusion on the

argument, at best, represents a triumph of form over substance. The fallacy of cross-petitioners' argument is readily apparent from the language of the California statute[26] amending California's unemployment compensation law to extend unemployment compensation coverage to state and local employees.

That statute expressly provides that it was enacted "to implement Public Law 94-566 [the 1976 Amendments], which is hereby deemed to be a federal mandate' . . .," and that failure to conform to the Amendments "would seriously disrupt California's economy."[27] In *Village of*

merits, also rejected the federal government's standing argument. In *Cabais*, Judge Parker reasoned:

> [T]he government's insistence that plaintiffs can only obtain relief by challenging each state statute ignores what is indisputable – that at least some states enacted conforming legislation in direct response to the federal requirement. At least five such states have incorporated 'self-destruct' clauses in their state offset laws, applying the pension reduction provision only if required by federal law.

527 F.Supp. at 502 (footnote omitted). In *Rivera*, Judge Peckham reasoned, similarly, that "the legislative history of the state [California] enactments suggests quite strongly that they were enacted solely as a result of federal compulsion," and that "it is quite clear that there is a 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" 524 F.Supp. at 142 (quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977) (emphasis added)).

In view of the virtual identity of argument, it is apparent that the federal government takes the position that no one has standing to challenge provisions of the FUTA because the federal government is in no way responsible for the consequences of unemployment compensation laws. It is also apparent that the federal government will continue to make the same standing argument until this Court resolves the issue. The instant suit provides the Court with the appropriate opportunity to resolve this issue.

[26] 1978 Cal. Stat. Ch. 2.

[27] *Id.* §§ 106,108 (Petition at 73a-76a).

Arlington Heights v. Metropolitan Housing Development Corp.,[28] this Court reiterated that the injury alleged only need be "fairly traceable to the defendant's acts or omissions" and may be indirect.[29] Apart from the fact that the moneys Burbank seeks to recover are in the possession of cross-petitioner Secretary of the Treasury, there is no question, in view of the language of the California statute, that the injury Burbank has alleged is traceable directly to the enactment and implementation of the 1976 Amendments. As a result, the requirements for standing are met.

The California statute also answers cross-petitioners' somewhat disingenuous argument that there is no indication that, if the 1976 Amendments are held unconstitutional, Burbank would not continue to be required to pay for unemployment compensation coverage of its employees. The statute specifically provides that, if the Court holds unconstitutional or invalid those provisions of the 1976 Amendments requiring California to extend unemployment compensation coverage to state and local employees, "then on the date the judgment or order of the [C]ourt becomes final . . . (a) [t]he provisions of this act to the extent that they relate solely or in part to unemployment insurance coverage for such [state and local] employees shall

[28] 429 U.S. 252 (1977).

[29] *Id.* at 261 (citing United States v. SCRAP, 412 U.S. 669, 688 (1973); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

to such extent be inoperative wholly or in part."[30] Under these circumstances, there may be no doubt that the injury for which cross-respondent seeks redress may be cured only by maintenance of this action against these cross-petitioners.[31]

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[30]1978 Cal. Stat. Ch. 2, § 104 (Petition at 73a-74a). Cross-Petitioners recognize this section of the California statute, but claim that that section does not cure Burbank's alleged lack of standing. Cross-Petition at 12 n. 9 The only explanation cross-petitioners offer for this otherwise unsupported assertion is that "a judgment of a district court would not trigger such a repeal." *Id.* In view of the lack of finality attaching to a district court decision, it is hardly surprising that California made the self-destruct clause of the statute contingent on a decision by this Court rather than an intermediate court from which review may be sought.

[31]Cross-Petitioners also suggest that California does not perceive or assert a violation of the tenth amendment to the Constitution, and that cross-respondent is an inappropriate party to assert such a violation. Again, one need only look to the California statute to see that California was deeply concerned with the coercive nature of the 1976 Amendments and the disruptive effects caused thereby, and supported challenges to the Amendments. 1978 Cal. Stat. Ch. 2, §§ 103, 104, 106, 108 (Petition at 73a-76a). In addition to the rights of California and the other States under the tenth amendment, political subdivisions such as Burbank also have tenth amendment rights. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976).

The tenth amendment, of course, is not the only right violated by the 1976 Amendments. As discussed more fully in the Petition, at 13-25, and the Brief of the City of Burbank in Reply, City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (No. 82-593), the 1976 Amendments violate established principles of federalism. In addition to the tenth amendment, the 1976 Amendments violate the doctrine of intergovernmental tax immunity and the Constitution's guarantee of a republican form of government. Cross-Respondent is also a proper party to assert these rights. *Id.*

CONCLUSION

For the foregoing reasons, cross-respondent does not object to this Court's granting of the Cross-Petition if the Court also grants cross-respondent's Petition.

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